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The President's Completion Power

ABSTRACT. This Essay identifies and analyzes the President's completion power: the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of congressional authorization to complete that scheme. The Essay shows that the completion power is a common explanation for very different presidential powers, including the administration of a presidential statute, prosecutorial discretion, and the use of force abroad without express congressional authorization. Maintaining that the widespread use of the completion power is a partial vindication of Chief Justice Vinson's neglected dissent in the *Youngstown Steel Seizure* case, this Essay argues that the completion power sheds light on a structural symmetry that cuts across Articles I, II, and III of the Constitution—namely, that each of the three branches has some degree of inherent power to carry into execution the powers conferred upon it. The Essay also examines normative questions about the scope and limits of the power.

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INTRODUCTION

This Essay examines an important but understudied feature of executive power: the President's completion power. The completion power is the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme. The completion power complements but does not derive from particular statutory commands. It is a defeasible power; Congress can limit it, for example, by denying the President the authority to complete a statute through certain means or by specifying the manner in which a statute must be implemented. But in the absence of such affirmative legislative limitation or specification, courts and Presidents have recognized an Article II power of some uncertain scope to complete a legislative scheme.

The completion power merits analysis for at least three reasons. First, Presidents have exercised the completion power in very different contexts—for example, in administering a regulatory statute, in exercising prosecutorial discretion, and in using force abroad in the absence of express congressional authorization—based on nominally different sources of authority in Article II. Focus on the completion power as such might lend conceptual coherence to several important areas of executive authority whose connection has not previously been understood. Second, the most comprehensive statement of what we call the completion power is found in Chief Justice Vinson's neglected dissent in *Youngstown Sheet & Tube Co. v. Sawyer*.¹ Despite its general disregard in constitutional jurisprudence, the frame of analysis in Vinson's dissent corresponds to a surprising number of important post-*Youngstown* doctrinal developments. Given the canonical status of *Youngstown*, even a partial vindication of Vinson's approach is of intrinsic interest. Third, and perhaps controversially, examination of the completion power sheds light on a potentially interesting structural symmetry that cuts across Articles I, II, and III of the Constitution—namely, that even though only Article I contains an express Necessary and Proper Clause, each of the three branches has some degree of inherent power to carry into execution the powers conferred upon it.

Our aim in this Essay is to put the completion power, as a distinct presidential power, on the table for analysis. Space constraints compel us to cut a wide swath over many complex areas of executive power and bracket many complicating factors and nuances that a complete treatment of the subject would need to address. In these respects, the Essay seeks to be the first word,

1. 343 U.S. 579, 667 (1952) (Vinson, C.J., dissenting).

not the last, on the completion power. Part I describes the completion power through the lens of the leading opinions in *Youngstown*. Part II shows how aspects of the completion power suggested in Chief Justice Vinson's dissent have become central to post-*Youngstown* developments in several important areas of executive power. Part III examines normative questions about the completion power.

I. YOUNGSTOWN AND THE COMPLETION POWER

In the midst of the Korean Conflict, the United Steelworkers of America called a nationwide strike to resolve a labor dispute concerning the terms and conditions of employment in the steel industry. President Truman responded with an Executive Order directing the Secretary of Commerce to seize and operate the steel mills.² The Order contained specific presidential findings about the indispensability of steel production to the war effort in Korea and to other defense efforts.³ Before the Supreme Court, the Truman Administration relied not on express statutory authority to seize the mills, but rather on inherent executive authority emanating from the Clause vesting “the executive Power” in the President,⁴ the Commander in Chief Clause,⁵ and the Clause enjoining the President to “take Care that the Laws be faithfully executed.”⁶

The Supreme Court rejected these claims and enjoined the seizure. Writing for the majority, Justice Black began by noting that no statute expressly or impliedly authorized the seizure.⁷ Although the President had determined that the steel seizure was essential to procure vital defense matériel (pursuant, of course, to congressional appropriations), Black reasoned that the President derived no power from the Vesting or Take Care Clauses to seize the mills. Indeed, Black drew the opposite inference from the Take Care Clause, noting that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁸ For Justice Black, Article I’s Vesting Clause established that legislative power is exclusively vested in Congress, and the Necessary and Proper Clause underscored Congress’s power and

2. Exec. Order No. 10,340, 3 C.F.R. 861 (1949-1953).

3. *Id.*

4. U.S. CONST. art. II, § 1.

5. *Id.* § 2.

6. *Id.* § 3; see *Youngstown*, 343 U.S. at 587.

7. *Youngstown*, 343 U.S. at 585.

8. *Id.* at 587.

responsibility to provide the means for implementing the policies it adopts.⁹ The infirmity in President Truman's Executive Order was that it did "not direct that a congressional policy be executed in a manner prescribed by Congress—it direct[ed] that a presidential policy be executed in a manner prescribed by the President."¹⁰ Even if previous Presidents had undertaken similar actions, such practice did not, for Justice Black, divest Congress of "its *exclusive* constitutional authority" to make necessary and proper laws to implement its legislative authority.¹¹ In other words, the Vesting and Take Care Clauses did not create an Article II completion power, but rather authorized the President merely to carry out what Congress itself had specifically prescribed when exercising its legislative powers under Article I.

Chief Justice Vinson's dissent also focused on what we call the completion power, but of course viewed the power in a much different light. Vinson's opinion began by invoking an array of legislatively approved policies that President Truman's order sought to implement. Vinson described the legislative program at a high level of generality and implicitly conceded that it contained no mandate, express or implied, to seize the steel mills in the circumstances before the Court.¹² Nonetheless, in Vinson's judgment, the successful execution of a vast body of legislative commitments depended upon the President's ability to keep the mills functioning. Turning first to treaty obligations, Vinson cited the (Senate-approved) United Nations Charter, which articulates a purpose "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."¹³ Pursuant to that Charter, moreover, the U.N. Security Council had "called upon member nations 'to render every assistance' to repel aggression in Korea."¹⁴ After cataloguing a host of other specific international obligations assumed by the United States in the early Cold War period, Vinson emphasized the "large body of implementing legislation" that followed upon those commitments.¹⁵ Most important for Vinson were the military appropriations—" \$130 billion for our own defense and for military assistance to our allies since the June, 1950, attack

9. *Id.* at 588; see U.S. CONST. art. I, § 1; *id.* § 8, cl. 18.

10. *Youngstown*, 343 U.S. at 588.

11. *Id.* (emphasis added).

12. *Id.* at 668-72 (Vinson, C.J., dissenting).

13. *Id.* at 668 (quoting U.N. Charter art. 1, para. 1).

14. *Id.* (quoting S.C. Res. 1501, ¶ 3, U.N. Doc. S/RES/1501 (June 25, 1950)).

15. *Id.* at 670 (listing the Truman and Marshall Plans, the North Atlantic Treaty, and the Southeast Asia Collective Defense treaty).

in Korea.”¹⁶ Most of the resulting increase in defense spending and foreign military aid, he added, was “for military equipment and supplies—guns, tanks, ships, planes, and ammunition—all of which require steel.”¹⁷ For Vinson, the question in *Youngstown* came down to the related propositions that “[t]he President has the duty to execute the foregoing legislative programs” and that “[t]heir successful execution depends upon continued production of steel.”¹⁸

It did not matter to Vinson that no “specific statute authoriz[ed] seizure of the steel mills, as a mode of executing the laws.”¹⁹ Rather, Vinson thought the President possessed a residual capacity to take the steps necessary to carry out Congress’s program, even if Congress itself had not provided for those specific steps. He believed that “the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed,” and that “[f]lexibility as to mode of execution to meet critical situations is a matter of practical necessity.”²⁰ In making these arguments, Vinson emphasized the interpretive tradition of understanding open-ended constitutional provisions in light of the “practical construction” placed upon them over time by the branches of government charged with implementing them.²¹ Vinson offered multiple instances of historical practice—some stretching back to the early days of the Republic—to substantiate his claim that “the executive Power” and the Take Care Clause include a completion power that enables the President to go beyond (but not against) the implemental prescriptions of particular statutes, when necessary to effectuate the legislative program.²² Based upon these

16. *Id.*

17. *Id.* at 671.

18. *Id.* at 672 (emphasis added).

19. *Id.* at 701.

20. *Id.* at 702 (quoting *In re Debs*, 158 U.S. 564, 905 (1895)).

21. *Id.* (relying on a “practical construction of the ‘Take Care’ clause”).

22. *Id.* at 683-84 (noting that President Washington called the militia into service to enforce the revenue laws against pockets of resistance in Pennsylvania); *id.* at 684 (noting that President John Adams issued an extradition warrant for Jonathan Robbins to satisfy the terms of a treaty, even though no statute specified the method of extradition); *id.* at 685-86 (noting President Lincoln’s issuance of the Emancipation Proclamation in “aid of the successful prosecution” of the Civil War, and his seizure of the rail and telegraph lines leading to the capital); *id.* at 687 (noting that a federal marshal used lethal force to defend the life of a Supreme Court Justice, even though no federal statute specifically authorized such action, a decision upheld in *In re Neagle*, 135 U.S. 1 (1890)); *id.* at 687 (noting that President Hayes used troops to keep order during the railroad strike of 1877, and President Cleveland did likewise during the Pullman Strike in 1895 “to insure execution of the ‘mass of legislation’ dealing with commerce and the mails,” a decision approved in dictum in *In re Debs*, 158 U.S. at 582); *id.* at 689-93 (noting that President Taft withdrew from sale public oil lands that, by statute, were open to purchase, and that he did so to preserve the wasting public asset long

examples, Vinson concluded that "Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution."²³

To sharpen Vinson's conception of the completion power, it is helpful to consider its relationship to Justice Jackson's famous concurring opinion in *Youngstown* establishing a tripartite scheme for analyzing assertions of executive power. Jackson believed that Truman's steel seizure fell into his third category (in which the President undertakes "measures incompatible with the expressed or implied will of Congress") and concluded that the President possessed no constitutional authority to disregard Congress's will in these circumstances.²⁴ For him, therefore, the completion power was simply not implicated because that power cannot operate when Congress has expressly or by proper implication denied the President the power to complete. More telling for present purposes is the fact that in contexts in which Congress has not precluded its application, the completion power does not fall neatly into Jackson's other two categories. When the President completes a statutory scheme he is not exactly acting "pursuant to an express or implied authorization of Congress"²⁵ (Jackson's first category), for the defining characteristic of the completion power is that the President can complete even if the statutory scheme does not affirmatively authorize its completion. It would also, however, be misleading to describe the completion power in terms of Jackson's second category, in which the President acts "in absence of either a congressional grant or denial of authority."²⁶ The completion power depends on the existence of a statute or statutory scheme that the President is exercising independent powers to complete, even if the statute does not authorize such completion.²⁷

Professor Monaghan has written that *Youngstown* "represents the bedrock principle of the constitutional order: except perhaps when acting pursuant to

enough for Congress to act, a decision upheld in *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)); *id.* at 693 (noting that President Wilson established a War Labor Board during World War I without express legislative authorization and seized various industrial plants as well); *id.* at 693-97 (noting that, prior to American entry into World War II, President Franklin D. Roosevelt ordered the transfer of overage destroyers to Britain in exchange for the right to use various airfields and ordered the seizure of an aviation plant in California, a shipbuilding firm, and an aircraft parts plant).

23. *Id.* at 700.

24. *Id.* at 637, 640, 655 (Jackson, J., concurring).

25. *Id.* at 635.

26. *Id.* at 637.

27. Because they bear even less on the completion power, we do not analyze the other four concurring opinions in *Youngstown*.

some 'specific' constitutional power, the President has no inherent power to invade private rights; the President not only cannot act *contra legem*, he or she must point to affirmative legislative authorization when so acting."²⁸ This statement is true as far as it goes, but it does not speak to the significance for presidential power of being able to "point to" an affirmative legislative authorization. For Justice Black, this phrase would have meant that the President could only act to enforce what Congress had affirmatively authorized him to enforce, and that he had no residual authority under Article II to complete a statute in the absence of congressional specification. But since *Youngstown*, courts and Presidents have frequently taken positions closer to Vinson's, and in favor of a presidential authority to complete legislative schemes. It is to this post-*Youngstown* practice that we now turn.

II. THE COMPLETION POWER AFTER *YOUNGSTOWN*

This Part shows that in many different contexts, the Supreme Court and several different presidential administrations have embraced many aspects of Chief Justice Vinson's conception of the completion power. We do not endorse the reasoning in all of these examples; our aim here is purely descriptive. We begin with two foreign affairs contexts most similar to the analysis in Vinson's dissent and then analyze executive enforcement actions, presidential supervision of regulatory policy, and the *Chevron* doctrine.

A. Foreign Affairs Authorizations

In numerous contexts since *Youngstown*, the Supreme Court has permitted the President to exercise a very broad power, akin to the one urged by Chief Justice Vinson, to complete unfinished foreign relations authorizations. As we will see, the President's completion power in such cases is supported—as Vinson contemplated in *Youngstown*—by two general principles. The first principle is the presumptive legitimacy of longstanding presidential practice, a principle that the Court treats as "stronger in the foreign affairs arena" than in other contexts.²⁹ The second principle is the President's concurrent constitutional authority in the foreign affairs (and especially the war powers)

28. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10 (1993).

29. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 74 (1988).

field, an authority that attenuates nondelegation concerns in congressional authorization.³⁰

Many cases since *Youngstown* support this conception of the completion power, but we will use three to illustrate. The first is *Zemel v. Rusk*,³¹ which interpreted a 1926 statute providing that “[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States.”³² *Zemel* held that the Secretary of State acted legally pursuant to this statute when he imposed area restrictions on the use of passports and declined to validate passports for travel to Cuba. Although the unqualified language of the statute arguably did not by its terms provide any basis for area restrictions, the Court looked to custom, relying heavily on “both peacetime and wartime area restrictions” during the decade preceding the Act and noting “the State Department’s continued imposition of area restrictions during both times of war and periods of peace since 1926.”³³ The Court also rejected the argument that the passport authorization did “not contain sufficiently definite standards” to guide the President.³⁴ Relying on the famous dictum in *United States v. Curtiss-Wright Export Corp.* about the President’s exclusive constitutional powers as the “sole organ of the nation in its external relations,”³⁵ the Court noted:

[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.³⁶

Justice Black, among others, dissented in *Zemel*. He embraced the same strictly formal approach to the separation of powers as in his majority opinion in

30. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

31. 381 U.S. 1 (1965).

32. 22 U.S.C. § 211(a) (2000).

33. *Zemel*, 381 U.S. at 8-9.

34. *Id.* at 17.

35. 299 U.S. 304, 319-22 (1936) (quoting 10 ANNALS OF CONG. 613 (1800)).

36. *Zemel*, 381 U.S. at 17.

Youngstown, and he suggested that the *Zemel* majority's reliance on an inherent executive completion power was inconsistent with *Youngstown*.³⁷

A second and more extreme example of a presidential completion power in foreign affairs is *Dames & Moore v. Regan*.³⁸ In that decision, the Supreme Court concluded that, as part of resolving the Iran hostage crisis, the President "was authorized" to dismiss private claims against Iran pending in U.S. courts, even though, in contrast to *Zemel* and related cases, the Court could point to no statute that specifically purported to confer this authority.³⁹ The Court explained that despite Congress's failure to legislate on the issue, "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on *independent presidential responsibility*."⁴⁰ This construction was particularly appropriate, the Court maintained, because of a long history of unilateral executive branch claims that Congress was aware of and had never disapproved.⁴¹ In a nod to the idea of the completion power, the Court added that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act."⁴² *Dames & Moore* is thus an extreme case of the completion power—a case in which the President completed a congressional scheme by taking an action that was only loosely related to the scheme. The Court's reasoning is based on a combination of independent presidential power, "the general tenor of

37. *Id.* at 20–21 (Black, J., dissenting). In his essay for this Symposium, Dean Harold Hongju Koh says we do not "substantially address[] *Kent v. Dulles*." Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2371 (2006). But *Zemel* was part of *Kent*'s progeny, and *Kent* does not deny a completion power. The *Kent* Court invalidated State Department regulations under the 1926 statute that required denial of passports to members of the Communist Party. In so doing, the Court noted that it "hesitate[d] to find in this broad generalized power [over passports] an authority to trench so heavily on the rights of the citizen," and thus that it would "construe narrowly all delegated powers that curtail or dilute" fundamental rights. *Kent v. Dulles*, 357 U.S. 116, 129 (1958). In two post-*Kent* decisions (including *Zemel*, discussed in the text), the Supreme Court interpreted the identical passport statute to convey broad discretionary authority to the Secretary of State, in large part because the President's concurrent constitutional authority in foreign relations meant that he had extra discretion to complete the statutory scheme. *Haig v. Agee*, 453 U.S. 280, 291–92 (1981); *Zemel*, 381 U.S. at 17. For further discussion of *Kent*'s relevance in this context, see Bradley & Goldsmith, *supra* note 30, at 2087, 2101, 2102 & n.246, 2103.

38. 453 U.S. 654 (1981).

39. *Id.* at 686; see also *id.* at 675–84.

40. *Id.* at 678 (emphasis added) (internal quotations and citation omitted).

41. *Id.* at 686.

42. *Id.* at 678.

Congress' legislation,"⁴³ and past practice. As Dean Koh once correctly noted, *Dames & Moore* "effectively followed the dissenting view in *Youngstown*."⁴⁴

A third example of the completion power in the foreign relations context can be found in *Loving v. United States*.⁴⁵ The question in *Loving* was whether the President had the authority to prescribe aggravating factors in a death penalty sentencing phase of court-martial proceedings. The Uniform Code of Military Justice (UCMJ) recognized that the President could *limit* punishments in UCMJ trials.⁴⁶ In upholding the legality of the President's prescription of aggravating factors, the Court noted that the President had customarily exercised authority under the same statutory scheme to "increase the penalties for certain noncapital offenses if aggravating circumstances are present" in a way that "provided more precision in sentencing than is provided by the statute, while remaining within statutory bounds."⁴⁷ And the Court bolstered this conclusion with an analysis of the President's independent constitutional authority to determine the conditions of punishments imposed by military trials. The Court noted that the relevant question was "not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority."⁴⁸ The Court then reasoned that "[t]he delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'"⁴⁹ The Court explained that once Congress had delegated generally in the area of capital sentencing, "the President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors

43. *Id.*

44. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 139 (1990). *But see* Koh, *supra* note 37, at 2372 (backing away from this claim).

45. 517 U.S. 748 (1996). For other examples, see *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988); *Regan v. Wald*, 468 U.S. 222 (1984); and *Haig v. Agee*, 453 U.S. 280 (1981).

46. 10 U.S.C. § 856 (2000) ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."); *id.* § 818 (stating that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by [the UCMJ]").

47. *Loving*, 517 U.S. at 769.

48. *Id.* at 772.

49. *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975)).

without further guidance,” and “can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special [military] discipline.”⁵⁰

It is unclear what effect the Supreme Court’s recent decision in *Hamdan v. Rumsfeld*⁵¹ has on this line of cases. *Hamdan* held that the President lacked statutory authorization to try a member of al Qaeda in a military commission because the commission failed to comply with the statutory prerequisites of the UCMJ.⁵² *Hamdan* is consistent with the foreign affairs completion power cases, for it simply concluded that unlike in those cases, the President acted in the teeth of a congressional specification of how military commissions must be implemented. In other words, the Court framed *Hamdan* as an example of Congress’s exercising its undeniable authority, in areas outside of exclusive presidential competence, to specify the manner in which a statute must be implemented. At a broader level, however, *Hamdan* interpreted the pertinent congressional authorizations of presidential power—most notably, the UCMJ—much more restrictively than the above cases would have suggested is appropriate in areas of military affairs where the President enjoys concurrent authority. Nonetheless, *Hamdan* distinguished *Loving* and did not purport to overrule it or any of the other cases supporting the President’s power to complete congressional authorizations in foreign affairs.⁵³ *Hamdan* therefore need not be understood as a change in course of a decades-long line of cases recognizing a presidential completion power in foreign affairs.

B. Presidential Use of Military Force Abroad

The second example most closely related to Vinson’s dissent concerns the President’s use of military force abroad without express congressional authorization. The Korean Conflict that framed the *Youngstown* decision was the first large-scale military conflict in U.S. history initiated by the President without express congressional authorization, and it was also the first conflict in which the President justified his use of force abroad on the ground that he was executing obligations undertaken by the United Nations Charter.⁵⁴ In the sixty years since the Korean Conflict, Presidents and their advisors have continued

50. *Id.* at 773.

51. 126 S. Ct. 2749 (2006).

52. *Id.*

53. *Id.* at 2780.

54. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 225 (2d ed. 2006).

to assert very broad authority to use military force in the absence of specific congressional authorization. These uses of force without congressional authorization build on a historical tradition dating back to the nineteenth century. What is novel since the Korean Conflict are the legal justifications for these uses of force abroad—legal justifications first articulated in the Supreme Court in Chief Justice Vinson's *Youngstown* dissent.

First, presidential legal advisors have argued that the President can, in effect, complete congressional appropriations for the military forces by using these forces abroad to protect American interests. The argument in this context emphasizes that "in establishing and funding a military force that is capable of being projected anywhere around the globe, Congress has given the President, as Commander in Chief, considerable discretion in deciding how that force is to be deployed."⁵⁵ And as in other contexts, the argument relies on the long historical tradition of Presidents using force abroad without express congressional authorization, and on the President's independent sources of constitutional authority—in this case, the Commander in Chief Clause.⁵⁶

Second, presidential legal advisors have built on the Korean Conflict precedent and have argued that the use of force abroad without statutory congressional authorization is justified as part of the duty to complete international obligations or, more generally, to further the national interest reflected in these obligations. So, for example, presidential legal advisors sought to justify the Vietnam War in part by reference to the President's duty to enforce the treaty that had created the Southeast Asia Treaty Organization;⁵⁷ the 1980 invasion of Iran in part by reference to the President's Take Care power to "enforce international obligations";⁵⁸ the military operation in Somalia on the basis of furthering the "vital national interest" of "maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring that the effectiveness of United Nations peacekeeping operations can be considered a

55. The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them, Op. Off. Legal Counsel, 2001 OLC LEXIS 35, *25 (citing Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173, 177 (1994)).

56. See *id.* at *6; Deployment of United States Armed Forces into Haiti, *supra* note 55, at 173.

57. See, e.g., *U.S. Commitments to Foreign Powers: Hearings Before the S. Comm. on Foreign Relations*, 90th Cong. 146 (1967) (statement of Nicholas Katzenbach, Att'y Gen. of the United States); Memorandum from Leonard C. Meeker, State Dep't Legal Advisor, to the Senate Comm. on Foreign Relations (Mar. 4, 1966), in 54 DEP'T ST. BULL. 474, 480-81 (1966).

58. Presidential Power To Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 186 (1980).

vital national interest";⁵⁹ and the invasion of Bosnia by reference to furthering a similar national interest as reflected in the NATO treaties and NATO actions in central Europe.⁶⁰

C. Executive Enforcement

An example of the completion power not found in Vinson's dissent but strongly reaffirmed in the post-*Youngstown* period is the tradition of (presumptively unreviewable) prosecutorial discretion.⁶¹ Prosecutorial discretion requires policy determinations about how best to implement a statutory program. As Jerry Mashaw has written: "What cases are important enough to pursue entails policy discretion of the broadest sort. When to withhold remedial sanctions or alternatively to make an example of some offender raises issues of basic moral and political values."⁶²

In the criminal context, this principle means that, as a general matter, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."⁶³ While a defendant may assert a claim of selective prosecution on the basis of some constitutionally protected criterion, such claims rarely succeed.⁶⁴ The reason for the underlying judicial reluctance to review prosecutorial decisions derives from the background constitutional premise that the exercise of such discretion is "a special province of the Executive."⁶⁵ As the Fifth Circuit has explained in a prominent decision:

The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. . . . The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any

59. Authority To Use United States Military Forces in Somalia, 16 Op. Off. Legal Counsel 6, 11 (1992).

60. Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. Off. Legal Counsel 327 (1995).

61. On the presumption against judicial review of prosecutorial discretion, see *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996); and *Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

62. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985).

63. *United States v. Nixon*, 418 U.S. 683, 693 (1974).

64. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

65. *Id.*

question of probable cause. . . . It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.⁶⁶

In other words, the decision whether to bring a case reflects constitutional assumptions about the executive's discretion to complete the statutory scheme.

Similar principles apply in the civil context, though the Court has shown a greater willingness here to countenance judicial review. In *Heckler v. Chaney*,⁶⁷ the Court read the Administrative Procedure Act's (APA) preclusion-of-review provisions broadly in light of the Take Care Clause.⁶⁸ Despite the ordinarily strong background presumption of reviewability that governs agency action, the Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."⁶⁹ The Court found that the executive's interest in completing the terms of a statute by determining appropriate occasions for enforcement merited at least the presumption of judicial abstinence:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.⁷⁰

In other words, an agency's determination of when not to bring an enforcement action also falls within "the special province of the Executive

66. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (footnotes omitted).

67. 470 U.S. 821 (1985).

68. As relevant here, the APA provides that its judicial review provisions apply "according to the provisions [of the judicial review chapter], except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (2000).

69. *Heckler*, 470 U.S. at 831.

70. *Id.* at 831–32.

Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"⁷¹

Once again, the completion power is defeasible by contrary congressional command.⁷² If Congress specifies mandatory guidelines for the exercise of the executive's enforcement authority, then Congress has the power to provide for judicial review of decisions not to bring such actions.⁷³ Whatever the precise scope of some such congressional authority to enhance judicial review in these contexts, the availability of that authority is fully consistent with the notion of a President's default Article II authority to complete the statutory scheme.

D. Presidential Supervision of Rulemaking

For at least a quarter of a century, successive Presidents have exercised significant supervisory authority over rulemaking through executive orders that impose upon executive agencies various substantive policy obligations, reporting requirements, and central policy planning responsibilities. Administered through the Office of Management and Budget (OMB), the approach reflected in these executive orders came to prominence with President Reagan's adoption of Executive Order No. 12,291.⁷⁴ The most important aspects of this Order for present purposes are its requirements that, "to the extent permitted by law," new regulations must ensure that "potential benefits to society . . . outweigh the potential costs"; that agencies must choose regulatory goals that "maximize the net benefits"; and that they choose the alternative that imposes "the least net cost."⁷⁵ President Clinton supplanted those orders with his own directive, Executive Order 12,866, which differed in

71. *Id.* at 832 (quoting U.S. CONST. art. II, § 3).

72. This is so at least in the civil context. It is somewhat less clear whether Congress could, consistent with the constitutional separation of powers, subject the decision not to prosecute to judicial review for reasons other than selective prosecution.

73. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

74. Exec. Order No. 12,291, 3 C.F.R. 128 (1981).

75. *Id.* § 2(b)-(d). For "major rules" (defined as those having various significant effects on the United States economy), the Executive Order implemented this requirement by directing executive agencies to submit regulatory impact analyses to the OMB. *Id.* § 3. In addition, a second Reagan directive further required each executive agency to submit to OMB an annual "statement of its regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned." Exec. Order No. 12,498, § 1, 3 C.F.R. 323 (1985).

important details but continued the same philosophy of centralized supervision and cost-benefit analysis.⁷⁶

The Reagan and Clinton Executive Orders represent a clear and important example of the completion power. These Orders impose a cost-benefit analysis on all executive agencies when the organic statutes in question do not preclude it. The cost-benefit requirement is an executive branch policy decision about how best to implement the discretionary authority of federal agencies under scores of federal statutes. It does not purport to derive from any statutory command. It represents a decision of the executive branch about how to complete statutes.

The Reagan Administration's Office of Legal Counsel (OLC) justified Executive Order No. 12,291 purely as an exercise of the President's Article II authorities.⁷⁷ In a classic exposition of the completion power, OLC's formal opinion explained:

The President's authority to issue the proposed executive order derives from his constitutional power to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3. It is well established that this provision authorizes the President, as head of the Executive Branch, to 'supervise and guide' executive officers in 'their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.' *Myers v. United States*, 272 U.S. 52, 135 (1926).

The supervisory authority recognized in *Myers* is based on the distinctive constitutional role of the President. The "take care" clause charges the President with the function of coordinating the execution of many statutes simultaneously⁷⁸

The OLC opinion then identified the intellectual source for this idea, quoting Chief Justice Vinson's *Youngstown* dissent: "Unlike an administrative

76. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (2000); see also, e.g., Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1505-07 (2002) (comparing the Reagan and Clinton Orders). The Clinton Executive Order took a "first step toward including independent agencies" by requiring them to participate in the centralized review of regulation conducted annually by OMB. Hahn & Sunstein, *supra*, at 1507.

77. See Proposed Executive Order Entitled "Federal Regulation," 5 Op. Off. Legal Counsel 59 (1981).

78. *Id.* at 60 (footnote omitted).

commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a mass of legislation be executed.”⁷⁹

OLC’s analysis, of course, has provoked a lively debate among academics.⁸⁰ For present purposes, however, the important point is this: For a quarter of a century the executive branch has exercised an ambitious program of regulatory supervision that is a clear example of the President’s completion power and that has been justified on terms that derive directly from Chief Justice Vinson’s *Youngstown* dissent.⁸¹

79. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting)) (internal quotation omitted). OLC’s analysis predated *Morrison v. Olson*, 487 U.S. 654 (1988), which affirmed congressional power to impose “good cause” restrictions on the President’s authority to remove even officials performing executive functions. *Morrison* might suggest that Congress could choose to limit the President’s power to supervise agencies exercising executive authority. That holding, however, would not affect the logic of OLC’s completion power analysis, which only applied to executive agencies for which such removal restrictions have not been imposed. Moreover, no case, including *Morrison*, has directly addressed the extent to which Congress may limit the President’s supervisory authority by restricting his or her power to remove subordinate officers who refuse to follow specific directions about the faithful execution of the law. *See, e.g.*, John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1302–08 (1999). This issue taps into a broader debate about the extent to which Congress possesses constitutional authority to vest the responsibility to carry out congressional commands exclusively in agencies beyond the President’s control. *Compare, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (arguing against the unitary executive theory), with Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing for the unitary executive theory). This issue does not affect our analysis of the completion power. Even if Congress has the authority to create independent agencies pursuant to the Necessary and Proper Clause, that idea is not inconsistent with the background assumption, central to the completion power, that the President has presumptive authority to carry out the laws when Congress has not cordoned off the implementation of the law from presidential authority. As we have already suggested, and as we explain in greater detail below, the completion power is defeasible by Congress unless the question in issue represents an exclusive executive prerogative.

80. *Compare, e.g.*, Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1245–55 (1981) (arguing that the Reagan Executive Order is legitimate under Article II), with, *e.g.*, Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1205–16 (1981) (arguing that it is not).

81. Dean Elena Kagan has argued that the Reagan and Clinton Executive Orders cannot and need not be grounded in the President’s Article II authority. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–31 (2001). Her position is that the authority to engage in such regulatory supervision is reasonably attributable to constructive legislative intent in those statutes that establish executive rather than independent agencies. *Id.* at 2327–

E. *The Chevron Doctrine*

Our final example of the completion doctrine is perhaps the most contested: the presumptive regime of binding deference to agency interpretations of statutes known as the *Chevron* doctrine.⁸² *Chevron*'s famous two-step framework counsels courts (1) to use "traditional tools of statutory construction"⁸³ to determine whether Congress has "directly spoken to the precise question at issue,"⁸⁴ and then (2) if the statute is ambiguous, to ask only whether the agency interpretation is "permissible" or "reasonable."⁸⁵ This doctrine recognizes that administrative agencies have significant discretion to fill in the details of vague or ambiguous regulatory statutes. Such agency discretion is a contested example of the completion power because most commentators view it to be grounded ultimately in Article I, not Article II. These scholars see *Chevron* as a presumptive default rule of interpretive authority based on a reasonable congressional meta-intent about the proper allocation of law-elaboration authority over regulatory statutes.⁸⁶ We agree that *Chevron* should be interpreted as a default rule in the sense that the executive branch presumptively may fill in the legislative details unless Congress specifies otherwise. But we think the default rule, properly understood, is most plausibly explained in terms of constitutional values grounded in what we call the completion power.

One indication that *Chevron* is not a rule grounded in any plausible reconstruction of a genuine congressional meta-intent is that the *Chevron* Court applied its new framework retroactively to statutes that Congress had enacted against the very different pre-*Chevron* interpretive regime.⁸⁷ The Court could

28. We analyze below a similar attempt to explain what we regard as the completion power in terms of constructive legislative intent to authorize presidential action. See *infra* Section II.E.

82. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

83. *Id.* at 843 & n.9.

84. *Id.* at 842.

85. *Id.* at 843.

86. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986); Antonin Scalia, *Administrative Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511, 516-17.

87. Specifically, that default rule had provided that a reviewing court would attach no special weight to agency interpretations of statutes unless the court affirmatively found that some combination of multiple factors warranted such treatment in the particular circumstances of the case before it. See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972-80 (1992).

not justify this new framework as a plausible reconstruction of the way a reasonable legislator conversant with background interpretive conventions would have understood the applicable standard of review.⁸⁸ If the *Chevron* fiction is legitimate, it must have a claim of authority that goes beyond the likely expectations of a reasonable legislator. Moreover, the *Chevron* Court explicitly held that in our system of government, the application of policy discretion necessary to resolve residual statutory ambiguity—what we call here the completion power—is better understood as an executive branch function:

Judges . . . are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.⁸⁹

Consistent with the completion power's defeasibility by Congress, the Court has never suggested that the *Chevron* rule is constitutionally required. But we think it does reflect a constitutionally inspired default rule quite similar to the Court's (defeasible) interpretive presumption against interpreting statutes to interfere with principles of federalism.⁹⁰ The *Chevron* doctrine appears to reflect the idea that while Congress can legitimately give either courts or agencies ultimate authority to resolve statutory ambiguities or fill up statutory interstices, it is more consistent with the background premises of our constitutional democracy to embrace a default rule that Congress prefers to leave such completion power in the hands of the more accountable executive.⁹¹

88. The Court presumes that Congress enacts statutes against the backdrop of established rules of construction. See, e.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991).

89. *Chevron*, 467 U.S. at 865-66.

90. See *Gregory v. Aschcroft*, 501 U.S. 452, 461 (1991).

91. See, e.g., Merrill, *supra* note 87, at 978 ("In order to make deference a general default rule, the Court had to come up with some *universal* reason why administrative interpretations should be preferred to the judgments of Article III courts. Democratic theory supplied the justification . . ."); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency*

This is a plausible interpretation of *Chevron* itself, but the Supreme Court's more recent decision in *United States v. Mead Corp.*⁹² may call this interpretation into question. *Mead* held that the procedural mode by which an agency announces its interpretation may affect the appropriateness of presuming that Congress has delegated to the agency the authority to resolve residual ambiguity.⁹³ The Court reasoned that it is generally appropriate to infer an intention to delegate interstitial lawmaking authority to an agency when the organic act "provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."⁹⁴ In contrast, interpretations announced through more informal means (such as interpretative rules and general statements of policy, which are exempt from the APA's notice-and-comment requirements) presumptively do not merit *Chevron* deference unless a combination of factors peculiar to the organic act affirmatively indicates a congressional intent to delegate lawmaking authority despite the lack of formality.⁹⁵ In the absence of any such indication, reviewing courts must evaluate more informal agency interpretations of law under the less deferential form of review articulated in *Skidmore v. Swift & Co.*, a pre-*Chevron* mainstay that required reviewing courts to afford an agency interpretation whatever degree of deference was warranted by "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁹⁶

There is a growing and contentious literature that addresses what *Mead* means or should mean and that highlights the difficulty in determining *Mead*'s ultimate significance for the source of the *Chevron* doctrine.⁹⁷ At this point,

Theory of Government, 64 N.Y.U. L. REV. 1239, 1256 (1989) (describing *Chevron* as "an effort to reconcile the administrative state with the principles of democracy").

92. 533 U.S. 218 (2001).

93. *Id.* at 227-35.

94. *Id.* at 230. Along these lines, the Court found it significant that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Id.*

95. The crucial question under *Mead* is whether, despite the absence of formality, the statutory scheme at issue gives some indication of legislative intent to delegate to the agency authority to issue "rulings with the force of law." *Id.* at 231-32.

96. 323 U.S. 134, 140 (1944).

97. See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212; Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 470-71 (2003);

however, we do not believe that *Mead* undermines *Chevron*'s support for the completion power. *Mead* essentially says that procedural formalities like notice-and-comment rulemaking and formal adjudication are necessary to trigger *Chevron*'s categorical presumption.⁹⁸ But within those broad categories of *Chevron* deference left intact by *Mead*, it nonetheless remains necessary to identify a legal justification for the categorical presumption that, *Marbury* and the APA notwithstanding,⁹⁹ Congress would prefer agencies rather than courts to have binding authority to resolve residual ambiguities. In our view the best explanation for this is that executive branch officials are endowed with presumptive constitutional authority, grounded in Article II, to complete an ambiguous statutory scheme unless Congress specifies otherwise. In this light, one can understand *Mead* not as supplanting *Chevron*, but rather as resolving the uncertainty that surrounded the question whether *Chevron* applied to interpretations announced through highly informal means.¹⁰⁰ Although it is too early to tell, *Mead* may ultimately come to reflect the simple idea that if reviewing courts do not apply a less robust form of deference to agency interpretations arrived at through the informal procedures frequently available to agencies, then agencies will have little (if any) incentive to make policy through the more formal procedures prescribed by the APA.¹⁰¹ On any of these views, *Mead* does little to alter *Chevron*'s basic message about the presumptive constitutional allocation of governmental power.

Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006); Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003) (describing a post-*Mead* "muddle").

98. *Mead*, 533 U.S. at 230.

99. *Marbury* of course famously states that within the context of resolving cases or controversies, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The APA's judicial review provisions, moreover, state that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706 (2000). The judiciary's law-declaration function can be squared with strong deference to agency interpretations only through a default presumption that the organic acts themselves delegate law-elaboration power to the agencies. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2-7 (1983) (discussing *Marbury*, deference, and delegation prior to *Chevron*).

100. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 850 n.90 (2001) (describing the split in lower-court authority).

101. For further discussion of the relationship between deference and the differential agency incentives to use more rather than less formal procedures, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1430-31 (2004); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 937-44 (2004); and Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. (forthcoming 2007).

* * *

We acknowledge that one might conceptualize (or reconceptualize) some of the above examples of the completion power—especially the *Chevron* doctrine—as flowing from constructive congressional authorizations for the President to complete unfinished congressional schemes. If Congress prescribes the ends, one might argue, it is reasonable to impute to Congress the power to authorize the prescription of incidental means. Even supporters of this view suggest, however, that this approach often rests on “fictional . . . intent.”¹⁰² To attribute the above examples of the completion power fully to congressional preferences is to state a normative conclusion about what a reasonable legislature should or might do, rather than a factual description of what Congress has actually decided, or what most of the relevant cases and legal opinions say about the source of the President’s power to complete. Grounding the power to complete in the President’s Article II power is more straightforward, more consistent with the reasoning underlying most of the precedents, and, as we now suggest, more consonant with constitutional structure.

III. THE COMPLETION POWER: A TENTATIVE ANALYSIS

Chief Justice Vinson’s dissent in *Youngstown* shows that Presidents have long exercised, and courts have long recognized, some version of a presidential authority to prescribe incidental details of implementation necessary to complete an unfinished statutory scheme.¹⁰³ Of course, the Necessary and Proper Clause assigns to Congress the ultimate authority to establish the means of “carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁰⁴ It follows from that Clause that Congress has the authority to prescribe the means as well as the ends of governmental policy, and that the executive must follow the legislature’s prescriptions, except in matters that are assigned to exclusive presidential discretion, such as the power to pardon federal offenses or to veto legislation. To suggest (as Justice Black and Dean Koh do) that Congress must—or, more importantly, that it could—supply the executive with every detail of implementation of any

¹⁰² Barron & Kagan, *supra* note 97, at 203.

¹⁰³ See *supra* note 22 and accompanying text.

¹⁰⁴ U.S. CONST. art. I, § 8, cl. 18.

statutory policy is implausible.¹⁰⁵ Where Congress has failed to specify in full the manner of enforcement, the executive necessarily exercises some discretion in specifying incidental details necessary to carry into execution a legislative program.¹⁰⁶

To say that some version of the completion power is practically necessary is not to say very much. In particular, recognition of such a power begs the question of its constitutional source and scope. We do not purport to resolve either of these questions here. Rather, we simply try to identify some considerations relevant to their resolution.

A. Constitutional Source

As the examples in Part II of this Essay suggest, a remarkable characteristic of the completion power is that courts and presidential advisors have justified the same functional power on the basis of at least three different sources in Article II—the Commander in Chief Clause, the Take Care Clause, and the Executive Vesting Clause. None of these Clauses is an uncontroversial source for this claim of power.

This is most obvious with the Commander in Chief Clause. As *Loving* shows, the Court has consistently interpreted this Clause to establish at least a concurrent authority in the President to adopt legally binding prescriptions in the military context in the absence of full congressional specification of the type at issue in *Hamdan*. *Zemel*, *Dames & Moore*, and other cases ground a similar completion power in the somewhat broader (and less textually explicit) authority of the President to conduct foreign relations. If, however, we are correct that the diverse phenomena described in Part II in fact represent a common constitutional tradition, then the source of that power must be more general than the Commander in Chief Clause and any related foreign relations authority. Those sources simply cannot explain the broader completion power implicit in prosecutorial discretion, presidential supervision of rulemaking, and the *Chevron* doctrine.

The generality of the Take Care Clause makes it a more plausible candidate for the source of the completion power. So too does the fact that the Take Care Clause contemplates a presidential responsibility to carry out the legislative

¹⁰⁵. That a legislature cannot prescribe an all-encompassing and pellucid system of implementation has long been understood. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *260–61; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 160, at 84 (C.B. Macpherson ed., Hackett 1980) (1690).

¹⁰⁶. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1402 (2001).

mandate. To understand the Take Care Clause to confer the completion power on the executive branch, however, implicates a much larger scholarly debate. Some scholars have argued that the Clause merely imposes a *duty* to follow the law rather than a power to carry it out.¹⁰⁷ This view of the Take Care power is consistent with Justice Black's conception in *Youngstown*. Others, by contrast, suggest that the Take Care Clause implies a more robust power to exercise discretionary interpretive judgments to make the law effective—a view more consistent with Chief Justice Vinson's conception of the completion power.¹⁰⁸ Whether the Take Care Clause supports the completion power depends in large part on the resolution of this debate.

Among textual sources, this leaves the Executive Vesting Clause, which has provoked similar scholarly debate. Some scholars believe that the Vesting Clause of Article II, Section 1 is merely a place marker indicating that the President is the actor with responsibility to carry out the specific functions enumerated in the balance of Article II (the pardon power, the commander in chief power, and the like).¹⁰⁹ Others think that "the executive Power" entails the residual of common law executive power—including something like the completion power—that were not explicitly limited or reassigned by the Constitution's express terms.¹¹⁰

These are perennial debates about presidential power that we obviously cannot resolve here. But we think that there may be a simpler way to understand the source of the completion power consistent with these debates, and with courts' (and presidential advisors') failure to consistently locate the completion power in any particular textual source. Even under the most parsimonious view of presidential power—what Vinson derided as Black's "messenger-boy concept of the Office,"¹¹¹ and what Harvey C. Mansfield, Jr. characterizes as the "dictionary" conception of executive power¹¹²—the

107. See, e.g., Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 873-74 (1994); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 90 (1983).

108. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 261-62 (1994).

109. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 48-50 (1994).

110. See, e.g., Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 714-20.

111. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 708-09 (1952) (Vinson, C.J., dissenting).

112. HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* 2-4 (1989).

President has authority to carry out congressional commands directed to the President or his or her agents. If one accepts this proposition, then some form of completion power necessarily follows. As we noted at the outset, unless the legislature is capable of adopting a pellucid and all-encompassing code for a given subject (and no one today believes that it can), then implementation of the law entails some degree of discretion. Indeed, this simple but important proposition is the cornerstone of the modern, weak nondelegation doctrine.¹¹³

To understand the nature of the completion power, it is helpful to analogize it to the Necessary and Proper Clause. The existence of that Clause might be said to contradict the premise of an executive completion power. Since the Necessary and Proper Clause itself confers upon Congress an explicit form of completion power, one might infer that the Framers would have used similar language in conferring an analogous power on the President. But a closer examination of the Necessary and Proper Clause may suggest quite the opposite and, in fact, may bring into sharp focus questions about the nature and limits of presidential completion power.

A prominent line of Federalist defense of that Clause against Anti-Federalist charges of national consolidation suggested that Congress would have enjoyed, by necessary implication, a form of completion power by virtue of the assignment of the enumerated powers.¹¹⁴ Those arguments were not

113. The Court has justified its persistent refusal to enforce the nondelegation doctrine by invoking the inevitability of some residual executive discretion in agency-administered statutes. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001). As Justice Scalia explained in an influential dissenting opinion, meaningful enforcement of any norm against delegation necessarily collides with the well-known reality "that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). Because the question of impermissible delegation ultimately reduces to one of degree (how much policymaking discretion is too much), the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474-75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). To suggest that the President may not fill in the details of the laws enacted by Congress is to contradict the conceptual basis for the modern version of the nondelegation doctrine.

114. See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185-87 (2003). For a modern expression of the Federalist position, see Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 7-8 (1998) ("Nor is it so clear that the words of the clause add anything at all to the scope of the earlier enumerations. If we think of each of the earlier enumerations as an island of explicit textual power ringed by some suitably-defined territorial sea of implicit ancillary power, we need not read the words of the Necessary and Proper Clause as widening the width of the appropriate territorial sea.").

only widespread, but seem to us to reflect a quite sound inference even in a system of limited government. Indeed, in *McCulloch v. Maryland* itself, Chief Justice Marshall acknowledged the idea that the grant of a substantive power, even without the Necessary and Proper Clause, necessarily implied some authority to carry that power into effect.¹¹⁵

If some form of completion power was implicit, of course, one might ask (as Dean Koh does) why the document includes an express Necessary and Proper Clause. Although the historical record is sparse, three considerations may explain the impulse to include that Clause. First, consistent with the completion power's defeasibility, the Clause may have been included to specify that Congress has the authority to carry into execution not merely the legislative powers conferred by Article I (perhaps the most natural inference about a legislative completion power), but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹¹⁶ Second, it is possible, as some have suggested, that the Necessary and Proper Clause provided (again, quite obliquely) a method of expressing certain constraints on the legislative power to carry the Constitution into effect.¹¹⁷ Third, perhaps because Article I's Vesting Clause—unlike the other two Clauses—refers to a closed and internally defined set of powers (vesting "[a]ll legislative Powers *herein granted*"¹¹⁸), prudence dictated making express what ordinarily might have been left to implication.¹¹⁹

The true reason for including an express Necessary and Proper Power will of course never be known, and for present purposes is irrelevant. What is important is that quite plausible grounds exist for the inclusion of that express authority—grounds that do not compel a negative implication from the failure to include a similar express completion power in Articles II and III. If such a negative implication is not compelled, it would be odd to read the constitutional scheme to assign powers without also assigning incidental authority to carry those powers into execution. Indeed, as the Court recently stated in *Hamdan*: "The power to make the necessary laws is in Congress; the

115. 17 U.S. (4 Wheat.) 316 (1819).

116. U.S. CONST. art. I, § 8, cl. 18. On the point in the text, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1891 (2005).

117. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291-97 (1993).

118. U.S. CONST. art. I, § 1 (emphasis added).

119. Compare *id.* (vesting "[a]ll legislative Powers herein granted"), with *id.* art. II, § 1 (vesting "[t]he executive Power"), and *id.* art. III, § 1 (vesting "[t]he judicial Power").

power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise.”¹²⁰

From this starting point, the early debates over the Necessary and Proper Clause nicely frame the problem posed by the executive completion power (and, for that matter, the closely related debate about “the judicial Power” to fill in the interstices of statutes using what some refer to as federal common law).¹²¹ In a quite literal sense, the Necessary and Proper Clause gives Congress a form of executive power—such power as is necessary and proper to “carry[] into Execution” the other powers assigned by the Constitution. The early debates—now overwhelmed by the force of Chief Justice Marshall’s liberal interpretation of the Clause in *McCulloch*—centered on how to determine the line between an appropriate legislative prescription of *means* to carry out the constitutionally enumerated *ends*, and an inappropriate arrogation of new powers.¹²² Does Congress’s power to prescribe the means for carrying into execution the express power of incurring debt authorize it to charter a corporation such as the Bank of the United States? Or is that the arrogation of a new power? In remarks that anticipated future debates about the means/ends problem in interpretation, Madison noted that there must be some limits of fit on Congress’s power to prescribe means because one can always spin out ways in which remoter and remoter means can be related to some broadly framed end such as borrowing money or regulating interstate commerce and the like.¹²³

120. 126 S. Ct. 2749, 2773 (2006) (quoting *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866)).

121. There is an interesting question, beyond the scope of this Essay, about the relationship between Congress’s Necessary and Proper power, the President’s completion power, and post-*Erie* federal common law. The most common post-*Erie* justification for federal common law authority lies in the authority of courts to make judicially implemented federal statutes—and the federal regulatory scheme—more effective. See, e.g., Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). And this idea, in turn, means that federal common law faces some of the same concerns about scope, legitimacy, and principled limits as the President’s completion power. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1255 (1996). Dean Koh’s enthusiasm for a broad judicial power to develop federal common law, see, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998), is in tension with his observation that the President cannot exercise a completion power because the Constitution gave Congress and not the President the “Necessary and Proper” authority, Koh, *supra* note 37, at 2368–69. On Dean Koh’s view, it is a puzzle why the courts and not the President have a form of completion power.

122. See Barnett, *supra* note 114, at 188–203 (describing early debates concerning the implementation of the Necessary and Proper Clause).

123. See 1 ANNALS OF CONG. 1949 (Joseph Gales ed., 1791) (statement of Rep. Madison) (“If implications, thus remote and thus multiplied, can be linked together, a chain may be

The executive completion power reflects similar (though surely less extensive) authority and similar line-drawing concerns. If, as we hypothesize, the President has background power to carry into execution acts of Congress (at least those not otherwise assigned to independent agencies), then the appropriate frame of analysis for such power greatly resembles the one used to analyze Congress's authority under the Necessary and Proper Clause. As we have explained, no statute can prescribe every implemental detail. So unless one takes the unrealistic stance that every detail of execution must be prescribed in advance by statute, the relevant question cannot be whether the President possesses completion power. Rather, it is: At what point do the executive's actions implementing a statute cross a line from something that is reasonably incidental to a statutory command into something that looks more like new lawmaking?

* * *

These observations about the Article II source of the completion power are tentative. And in an important sense, the source of the President's completion power—whether it is best conceptualized as flowing from Article I in the form of a congressional delegation, or from some clause in Article II—is immaterial. The reason it is immaterial is that regardless of the power's source in Article I or Article II, all of the examples in Part II of this Essay recognize that the President in fact possesses a power to complete statutory schemes, either through implied statutory authorization or as an inherent Article II power. Both the cases and arguments upon which we premise the completion power, and our constitutional traditions, indicate that the President's completion power is merely a presumptive power, defeasible by congressional command. This means that the important questions about the completion power have less to do with its source and more to do with its scope (how much discretion does the President have to complete a statutory scheme?) and limits (under what conditions does Congress defeat the completion power?). It is to these issues that we now turn.

B. Scope and Limits

The essence of the completion power is that it confers upon the executive a discretion that is neither dictated nor meaningfully channeled by legislative command. Cabining this power in a principled way depends on the capacity to

formed that will reach every object of legislation, every object within the whole compass of political economy.”).

identify a meaningful line between implementation (which belongs to the President) and legislation (which belongs to Congress). Many of the examples of the completion power outlined above—including the presumption of deference to administrative interpretations of law, the President's use of military force without congressional authorization, and the Supreme Court's decision in *Dames & Moore*—are contested, and these examples illustrate how easily claims of completion power drift into governmental action that, to many, intuitively feels like lawmaking rather than execution.

Although we cannot here address all of the considerations that should inform the determination of the appropriate exercise of the completion power, we do note several factors that may properly inform the analysis. First, the completion power does not permit the President to act *contra legem*. The Take Care Clause means that the President has a duty to observe the lawful boundaries of matters over which Congress has the constitutional power to act. As early as 1838, the Court emphasized that “[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”¹²⁴ Recognizing such authority, the Court added, would be “vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress”¹²⁵ This conception, as discussed, dovetails with the idea—articulated most clearly in the present day by *Chevron*—that when Congress “has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹²⁶ This conception is also consistent with the power of Congress to authorize the judiciary, rather than the executive, to complete the terms of an unfinished statute, or to grant the courts authority to review executive inaction.¹²⁷

As a consequence of the principle that the President may not constitutionally act *contra legem*, courts must examine whether Congress has impliedly precluded the exercise of the completion power by prescribing a detailed or comprehensive method of implementing a particular area of legislative policy. In this sense, it is possible that Vinson was right in

124. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838).

125. *Id.*

126. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

127. See *supra* note 73 and accompanying text.

identifying the framework for the completion power but misguided in applying it. Similarly, *Dames & Moore* might have drawn the wrong conclusions from the specific statutes that addressed the President's powers concerning hostages and the freezing of financial assets during emergencies. One reason why it is hard to assert a firm conclusion about the negative implications that might be drawn from either *Youngstown* or *Dames & Moore* is the highly contextual nature of the *expressio unius* canon's applicability and scope.¹²⁸ If a statutory text enumerates a particular way of doing something, the *expressio unius* canon directs interpreters to ask whether a reasonable person reading the words in context would have understood the specification to be exclusive.¹²⁹ Accordingly, in considering the completion power, executive branch officials and courts must be aware that the legislative specification of a particular means of achieving a policy may have preclusive effect.

Second, the completion power may not apply in contexts in which the Constitution assigns authority exclusively to Congress. Imagine that Congress passes legislation directing the Department of Defense to procure two new aircraft carriers but, because of rising costs, appropriates enough money to produce only one. Surely the President cannot appropriate enough money to complete the legislative program of aircraft carrier acquisition. The reason is, for the most part, straightforward: Article I, Section 9 explicitly provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."¹³⁰ If that Clause means that only Congress may supply the necessary appropriations, then the Clause concomitantly ousts the President from making appropriations to complete an unfinished legislative scheme.¹³¹ A more controversial example—and one obviously beyond the power of this Essay to resolve—is the extent to which the Declare War Clause¹³² and related clauses limit the President's authority to deploy armed forces, supported by congressional appropriations, to execute tasks that the President believes are in the nation's interest.¹³³

128. See *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001).

129. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002); *United States v. MacCollom*, 426 U.S. 317, 321 (1976); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

130. U.S. CONST. art. I, § 9, cl. 7.

131. For the contrary view—that the President has the power to appropriate money in some circumstances—see J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162.

132. U.S. CONST. art. I, § 8, cl. 11.

133. Compare, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996), with KOH, *supra* note 44.

Third, as Vinson's opinion suggests (and as some of the foregoing examples confirm), the line between presidential completion power and lawmaking may be determined by longstanding traditions of presidential practice in particular contexts. Even if one believes that the President necessarily enjoys some measure of completion power, the precise contours of that power are not ascertainable through standard textual exegesis. In cases of such indeterminate grants of governmental power, our constitutional tradition has frequently credited the practical interpretations of open-ended clauses by the branches of government charged with the constitutional responsibility to implement them.¹³⁴ The intuition underlying that interpretive tradition is most famously captured by Madison's observation that "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."¹³⁵ Consistent with that premise, the Court long ago made clear that practical constructions of the Constitution's open-ended provisions over time represent a highly persuasive basis for understanding the document. That interpretive approach relies in part on the idea that if all three branches share official responsibility for interpreting the document, judges should be reluctant to disturb a settled pattern of political judgments around which (legal) society has settled and come to rest.¹³⁶ This point has special force if the pattern originated in the early days of the Republic, when those most familiar with the connotations of technical language and the resolution of underlying controversies were active in the production of the relevant practical constructions.¹³⁷ Although this premise appears frequently in separation-of-powers cases, the line-drawing difficulties inherent in identifying appropriate exercises of the completion power make the consultation of historical practice especially important here.

CONCLUSION

Our identification and brief analysis of the President's completion power is not meant to be exhaustive. There are surely other examples of the completion power that we have not examined. And there is obviously much more to say

134. For a recent defense of this view, with special attention to separation of powers, see Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. (forthcoming 2007).

135. THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

136. See, e.g., *Ex parte Grossman*, 267 U.S. 87, 118-19 (1925); *Schell v. Fauché*, 138 U.S. 562, 572 (1891); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

137. See *Myers v. United States*, 272 U.S. 52, 175 (1926).

about the proper basis and scope of the power. But even our brief analysis suggests that the majority opinion in *Youngstown*—as well as Dean Koh's arguments in support of that opinion—are misguided in suggesting an utter lack of completion power in the President. It is possible, as Dean Koh's characteristically thoughtful response to this Essay suggests, that the Supreme Court's decision in *Hamdan* will lead courts and Presidents to rethink the legitimacy and justification for the various presidential powers that we outlined in Part II. But we doubt it. Some form of the completion power is inevitable, and the completion power's elimination or even significant attenuation is no more likely after *Hamdan* than it was after *Youngstown*.

To be sure, the *Youngstown* concurrences of Justices Jackson, Frankfurter, Clark, and Burton have a considerable claim to legitimacy in their resolution of the particular controversy insofar as they argued that Congress had prescribed a sufficiently detailed means of addressing the problem of disruptions in defense supplies in emergency contexts and handling labor disputes that result in national emergencies. But it was Chief Justice Vinson's neglected dissent that, even if wrong on the facts of *Youngstown*, has proven the most prescient. That opinion highlighted the background authority that the President has to complete an underlying statutory scheme, even in the absence of an express or implied authorization to do so. Whether or not that completion power was appropriately exercised in *Youngstown* itself, it has become a familiar feature of the post-*Youngstown* understanding of presidential power.

